

## **FINAL STATEMENT OF REASONS:**

The California Department of Corrections and Rehabilitation (CDCR) proposes to amend Section 3370 of the California Code of Regulations (CCR), concerning appropriate access to inmate unit health records.

Unit health records are all records of care and treatment rendered to an inmate-patient, including medical, dental, and psychological files. Title 15, Section 3370, would provide that a copy of inmate unit health records is available to the Attorney General, other attorneys for the CDCR, the California Inspector General, and the Board of Prison Terms (now called the Board of Parole Hearings). The purpose of this amendment is to ensure that attorneys hired to represent the Department, the Attorney General, the Board of Parole Hearings, and the California Inspector General, have access to inmate and parolee unit health records and case records files, as needed for their duties. This is accomplished by clarifying that the release of documents to those persons and entities is required by law disclosure, and that the release is therefore consistent with applicable law. The amendment otherwise forbids the release of inmate and parolee unit health records and case records files to anyone outside the Department, except to the listed persons and entities, and to other persons and entities who may receive the unit health records and case records files as provided by law, such as to a person with a valid authorization from the inmate or parolee. Any outside person or entity that receives case records files or unit health records must maintain the confidentiality of those records, subject to all legal and departmental standards.

These proposed changes also clarify that inmates and parolees may review their own case records file and unit health records, subject to applicable federal and state law. However, except by means of a valid authorization, subpoena, or court order, no inmate or parolee shall have access to another's case records file or unit health records. This amendment encodes the existing practices of the CDCR, in accord with federal and state privacy law.

The CDC must determine that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected private persons than the action proposed.

**Section 3370 is retitled to** include the words "And Unit Health Records".

**Subsection 3370(a) is amended to** provide a definition of what a unit health record is.

**Subsection 3370(a) is renumbered to subsection (b) and is amended to** reflect the legal instruments that are required for an inmate or a parole to access another inmate or parole's case records file or unit health records, or any part of such records or files.

**Subsection 3370(b) is renumbered to subsection (c) and is amended to** clarify that in addition to inmates and parolees being able to review their own case records file, they may also review their unit health records, with such review subject to applicable federal and state law.

**Existing subsection 3370(c) is renumbered to subsection (d) and is unchanged.**

**Existing subsection 3370(d) is renumbered to subsection (e) and is amended to** include unit health records in the restricted items that cannot be released to any agency or person outside the Department. The office of the Inspector General is added to those agencies that are an exception to this rule. Language is added that restricts any outside person or agency that has access to these records or files are subject to all legal and departmental standards for the integrity and confidentiality of those documents.

## **ASSESSMENTS, MANDATES, AND FISCAL IMPACT:**

This action will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

The Department determines this action imposes no mandates on local agencies or school districts, and no fiscal effect on federal funding to the state, or private persons. It has been determined there will no fiscal impact or savings on state or local government. It has also been determined that this action does not affect small businesses nor have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, because they are not affected by the internal management of state prisons; or on housing costs; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561.

## **DETERMINATION:**

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected persons.

## **PUBLIC COMMENTS:**

**Public Hearing:** Held June 28, 2005, at 10:00 a.m.

## **SUMMARIES AND RESPONSES TO ORAL COMMENTS AT THE PUBLIC HEARING**

There were no commenters present at the Public Hearing.

## **SUMMARIES AND RESPONSES TO WRITTEN COMMENTS**

### **COMMENTS #1:**

**Comment A:** Commenter states that the Amendment to Title 15, Section 3370, would preclude an attorney who represents an inmate from obtaining an inmate's unit health records, even if the inmate signs a valid authorization to disclose the records to the attorney.

**Accommodation:** None

**Response A:** The Department contends that this comment misinterprets the Amendment. Subsection (e) of the amended Section 3370 would allow inmate unit health records to be disclosed outside the Department "as provided by applicable federal and state law." Federal and state law permits a disclosure of private health care records to anyone, upon a valid authorization from the patient, pursuant to 45 Code of Federal Regulations (CFR), Section 164.508, and California Civil Code (CCC), Section 56.10. A disclosure of inmate unit health records to an attorney, if authorized by the inmate who is the subject of the records, is thus provided by applicable federal and state law. The Amendment to Title 15, Section 3370, would accordingly not impede this type of disclosure.

### **COMMENTS #2:**

**Comment A:** Commenter suggests that the Amendment to Title 15, Section 3370, involving a disclosure of inmate unit health records, would entail a violation of the physician-patient privilege and the psychotherapist-patient privilege, pursuant to the Federal Rules of Civil Procedure, Rule 26(b)(5), and certain Sections of the United States Constitution.

**Accommodation:** None

**Response A:** The Department contends that unit health records are subject to release if their disclosure is required by law, pursuant to CFR Section 164.512(a), and CCC, Section 56.10(b)(8). The amended Title 15, Section 3370, would require the disclosure of unit health records as needed to private attorneys hired to represent the Department, the Attorney General, the Board of Prison Terms, and to the Inspector General. Such a disclosure of inmate unit health records, as would be required under the Amendment, would not unlawfully intrude on privilege. Additionally, the cites that the commenter utilizes in support of his contention are inapplicable and the Department does not consider them.

**COMMENTER #3:**

**Comment A:** Commenter suggests that the Inspector General should not have access to inmate unit health records because the Inspector General will not ensure their privacy.

**Accommodation:** None

**Response A:** The Department contends this is incorrect. Subsection (e) of the amended Title 15, Section 3370, would provide that any outside person or entity that receives unit health files is subject to all legal and departmental standards for the confidentiality of those records. Also, Penal Code, Section 6126.3, an outside statute, provides that the Inspector General may not release private documents that it uses in an investigation. The Inspector General, in this way, is entirely bound to all the applicable confidentiality provisions.

**COMMENTER #4:**

**Comment A:** Commenter expresses concerns that departmental mental health care providers are unclear about the extent that unit health records are available to or may be withheld from inmates and parolees. This pertains to Subsection (b) of the amended Title 15, Section 3370, which would provide that inmates or parolees may review their own unit health records “subject to applicable federal and state law.”

**Accommodation:** None

**Response A:** The Department contends that Subsection (b) clarifies that inmates and parolees are generally entitled to view their own unit health records, subject to limited exceptions. An example of an exception is specific medical or psychological information, which if known to the inmate, would be medically or psychologically detrimental to the inmate, pursuant to Title 15, Section 3321(a)(3). All Departmental health care providers should receive adequate training on this issue. If the Department lacks training about the extent that unit health records are freely available to an inmate or parolee, or when portions of the unit health records may be withheld by law, that training should be offered.

**Comment B:** Commenter objects that it would be costly and highly burdensome upon prison staff, for the staff to make copies of unit health records available to inmates and parolees upon request.

**Accommodation:** None

**Response B:** Subject to existing federal and state law, inmates and parolees already are allowed to receive copies of their own unit health records, pursuant to CFR, Section 164.524, and CCC, Section 1798.34. The Amendment does not create any new costs or administrative burdens upon the prison staff.

**COMMENTERS #5-8:**

**Comment A:** Commenters, writing similar comments, object to the Amendment on the general grounds that it is unethical to disclose inmate unit health records, without written authorization from the inmate-patients.

**Accommodation:** None

**Response A:** The Department does not agree that it is unethical to disclose unit health records to attorneys who represent the Department, the Attorney General, the Board of Prison Terms, and the Inspector General. In their respective roles as advisors and watchdogs, the activities of the attorneys above and the Inspector General are central to satisfy the Department's constitutional and court ordered obligations to maintain quality health care for inmates, ensure the continuity of care, and provide any reasonable medical and disability accommodations in prison for inmates. For the Board of Prison Terms, unit health records are relevant to the determination of whether an inmate meets the criteria of a mentally disordered offender and must receive mental health treatment in the community when he or she goes out on parole. Also, the Board must provide any reasonable medical and disability accommodations for inmates and parolees at their parole proceedings. Each of these persons and entities must have access to the unit health records, as needed for their duties. The Department otherwise strictly maintains the privacy of all health records. Under the amended Subsection (e) to Title 15, Section 3370, any person or entity that receives unit health records is subject to all legal and departmental standards for the confidentiality of those records.

**COMMENTER #9:**

**Comment A:** Commenter suggests that the Amendment would violate federal health care privacy law by making inmate unit health records available to attorneys who represent the Department, the Attorney General, the Board of Prison Terms, and the Inspector General, because those entities are not medical personnel.

**Accommodations:** None

**Response A:** The Department contends that the federal law does not limit the release of private health information only to medical personnel. To the contrary, it allows for the unauthorized disclosure of patient health information in many other contexts, such as to law enforcement when carrying out an investigation, and to non-health care prison staff when necessary to ensure the good order of the prison, pursuant to 45 CFR, Section 164.512. As described in our response to comments #5 through #8, legitimate reasons exist to require a release of unit health records to these persons and entities.

**Comment B:** Commenter objects that the Amendment establishes no responsibility or accountability for the unit health records, once they are disclosed.

**Accommodation:** None

**Response B:** The Department contends that this is incorrect. Subsection (e) of the amended Title 15, Section 3370, states that any person or entity receiving unit health records, must maintain the confidentiality of the records, subject to all legal and departmental standards.

**Comment C:** Commenter objects that the Amendment discriminates against inmates and parolees, by reducing the extent to which their health records are maintained as confidential.

**Accommodation:** None.

**Response C:** The Department contends that this is incorrect. For the Department to fulfill its mandates to provide adequate health care and accommodations, it is necessary for unit health records to be available to the specified persons and entities. There is no effort to discriminate against inmates and parolees, or disregard the privacy of their records.

#### **COMMENTER #10:**

**Comment A:** Commenter suggests that Subsection (e) to the amended Title 15, Section 3370, would be ambiguous, because it is unclear about whether a person or entity specified in that Subsection must first obtain a patient authorization, a subpoena, or a court order before unit health records are disclosed.

**Accommodation:** None.

**Response A:** The Department contends that this is incorrect. Subsection (e), when read as a whole, sets out plainly that inmate unit health records are not available to anyone outside the Department, except for attorneys hired to represent the Department, the Attorney General, the Board of Prison Terms, the Inspector General, and others who may obtain them as provided by applicable federal and state law. The exempted persons and entities do not need to show an authorization, a subpoena, or a court order.

**Comment B:** Commenter asserts that, to the degree the Amendment might contravene federal or state health care privacy law, it should not be adopted.

**Accommodation:** None.

**Response B:** The Department contends that the Amendment would legitimate the release of unit health records to any persons or entities specified in subsection (e), as required by law disclosure, pursuant to 45 CFR, Section 164.512, and CCC, Section 56.10(b)(8).

#### **COMMENTER #11**

**Comment A:** Commenter suggests it would be unethical to make unit health records available to the persons and entities specified in Title 15, Section 3370, Subsection (e), without an authorization from the inmate or parolee who is the patient.

**Accommodation:** None.

**Response A:** See Commenter's #5 through 8, Response A, above.

**Comment B:** Commenter suggests that the disclosure of unit health records to the persons and entities specified in Subsection (e) does not comport with CCC, Section 1798.24(d).

**Accommodation:** None.

**Response B:** The Department contends that the referenced statute, part of the Information Practices Act (IPA), provides that personal information in general, such as an inmate central file, is available to the staff and attorneys of a state agency if its disclosure is relevant and necessary to the ordinary performance of their duties, and is related to the purpose for which the information was acquired. The Department nevertheless applies the Confidentiality of Medical Information Act (CMIA) to this matter, which is more specific to the disclosure of patient health data than the IPA. The CMIA allows the disclosure of inmate unit health records, as required by law pursuant to CCC, Section 56.10(b)(8). However, even if CCC, 1798.24(d) does apply, there is still no violation. As described in our response to Commenter's #5 through #8, the disclosure of the unit health records are relevant and necessary to the attorneys who are listed in Subsection (e). Those attorneys would use the unit health records to help ensure that quality health care is continuously provided. This is related to the purpose for which the information was acquired.

**Comment C:** Commenter suggests that the Department's policy for unit health records should be put in a separate regulation from Title 15, Section 3370; unit health records are subject to different privacy law than central files.

**Accommodation:** None.

**Response C:** The Department contends that with respect to unit health records, the Amendment implements the California Confidentiality of Medical Information Act (CMIA), pursuant to CCC, Section 56.10, and federal regulations for the Health Care Portability and Accountability Act of 1996, pursuant to CFR, Title 45, Sections 164.512 and 164.524. The Amendment also implements the state Information Practices Act, pursuant to CCC, Sections 1798.24 and 1798.40. The Department has ensured that the Amendment has been carefully worded to be sufficiently broad in its protection of inmate and parolee records privacy, and sufficiently narrow to the extent that those records can be disclosed, so as to comply with all these standards. A separate regulation for unit health records is therefore not essential.

#### **COMMENTER #12:**

**Comment A:** Commenter contends that the disclosure of unit health records to the persons and entities specified in Subsection (e) of the Amendment would violate Article 1, Section 1, of the California constitution, and the CMIA.

**Accommodation:** None.

**Response A:** The Department contends that consistent with California Constitution and the CMIA, the Amendment would validly allow disclosure to the appropriate persons and agencies, as required by law disclosure.

**Comment B:** Commenter contends that the Amendment has to make special provisions for the release of mental health treatment information, because mental health information is subject to a higher privacy standard than other documents in a unit health record.

**Accommodation:** None.



**Response B:** The department contends that mental health information is specially protected when its disclosure is discretionary under the CCC, Section 56.10(c), such as to an insurer or a billing agency, pursuant to CCC, Section 56.104. However, mental health information is not specially protected when its disclosure is mandatory (required by law) under CCC, Section 56.10(b). This Amendment would provide that disclosures of unit health records to attorneys hired to represent the Department, the Attorney General, the Board of Prison Terms, and the Inspector General, are required by law. It is thus unnecessary for the Amendment to distinguish between mental health information and other unit health records.

**Comment C:** Commenter contends that the disclosure of unit health records would compromise the psychotherapist-patient privilege, if those records contain confidential communications between a patient and a mental health provider.

**Accommodation:** None.

**Response C:** See Commenter #2, Response A, above.